

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

75-2085

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA, ex rel. SHELDON
SELIKOFF,

Petitioner-Appellee,

vs.

COMMISSIONER OF CORRECTION OF THE STATE OF
NEW YORK,

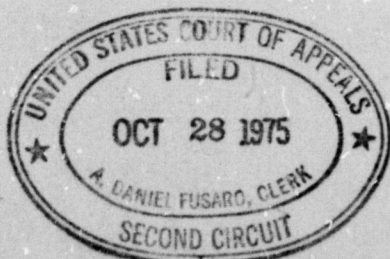
Respondent-Appellant,

and

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor.

**PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC AND MOTION IN THE
ALTERNATIVE FOR STAY OF MANDATE PENDING
CERTIORARI**



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Statute Cited:

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
Docket No. 75-2085
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UNITED STATES OF AMERICA, ex rel.
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Petitioner-Appellee,

vs.

COMMISSIONER OF CORRECTION OF THE
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and

THE PEOPLE OF THE STATE OF NEW YORK,

Intervenor.

-----X
PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC AND MOTION IN
THE ALTERNATIVE FOR STAY OF MANDATE
PENDING CERTIORARI

To the Honorable Circuit Judges Smith, Hays and Meskill:

The petitioner, Sheldon Selikoff, respectfully prays that this panel of the Court will grant him a rehearing and reconsideration of its decision of October 21, 1975, wherein it reversed the order of the United States District Court, Southern District of New York, Dudley B. Bonsal, Judge, which granted appellee's petition for a writ of habeas corpus

pursuant to 28 U.S.C. 2254.

We incorporate by reference the briefs and appendix heretofore filed herein.

BACKGROUND

The petitioner, Sheldon Selikoff, according to the determination of the District Court, 393 F.Supp. 48 (S.D.N.Y. 1975), received a representation from the State trial Court at the time of his guilty pleas which "reasonably led the petitioner to believe that no imprisonment would be imposed." (Slip opinion, p. 234).

REASONS FOR GRANTING A REHEARING

This panel unfortunately overlooked the fact that substantial prejudice would befall the petitioner if he had asked or had agreed to have his pleas of guilty vacated and proceed to trial. The reason for this is that he would go to trial not on the charges to which he pleaded guilty, but on all of the counts and on all four indictments which were extant prior to his pleas of guilty.

This panel also completely overlooked the fact that by acquiescing to the Trial Judge's directions to withdraw his pleas of guilty, he would be waiving his double jeopardy

claim on the counts and indictments that were dismissed. It is remarkable that this panel did not even mention the double jeopardy aspect of this case from that point of view, especially in view of the fact that Miss Cunard, the Western Assistant District Attorney who argued for The People, stated that the pleas of guilty and the dismissal of the other indictments and counts occurred after the commencing of the trial itself.

In addition to the foregoing, we submit that this Court has misinterpreted Santobello v. New York, 404 U.S. 257.

The writer of this brief successfully argued the Santobello case in the Supreme Court. Our highest Court, in Santobello, was unanimous in its determination that a reversal was required. With the exception of Justice Douglas, it was split evenly on the question of whether a promise had to be specifically enforced if the defendant so desired.

Justice Douglas declared that while he, too, voted for reversal, it was his opinion that great deference had to be paid, if not controlling deference, to the wishes of the defendant. Neither this Court nor the New York Court of Appeals has addressed itself to this aspect of the case.

This Court notes that the defendant has not sought to withdraw his pleas of guilty. If this Court were to hold

that upon such withdrawal of his pleas of guilty he could only be tried on the counts to which he actually pleaded guilty, then at least he would not be exposed to double jeopardy by being tried on those counts and indictments which were dismissed during the pendency of the trial itself.

We ask this Court therefore to at least make a determination of this aspect of the case in fairness to the petitioner.

It is thus submitted that there is great prejudice to the petitioner since he cannot be put back in status quo ante without waiving important rights, to say nothing of the fact that he would have to now go to trial alone since everyone else who had been indicted with him have now had their matters fully adjudicated.

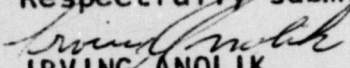
In the event this panel does not grant a rehearing or, upon granting it adheres to its original determination, then we ask that this important matter be heard en banc before all the Judges of this Court.

MOTION IN THE ALTERNATIVE FOR STAY
OF MANDATE PENDING CERTIORARI

In the event this Court ultimately adheres to the determination of this panel, we ask that a stay of mandate be granted pending a timely filing of a petition for certiorari, because of the important considerations involved.

In addition, the position of Justice Douglas siding with the majority in Santobello v. New York, supra, that great deference must be given to a defendant's wishes, should be resolved once and for all by the Supreme Court.

Respectfully submitted,

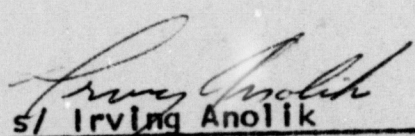

IRVING ANOLIK

Attorney for Petitioner-
Appellee Selikoff

CERTIFICATION OF GOOD FAITH

This petition for rehearing is submitted in good faith and not for the purpose of delay.

October 27, 1975


s/ Irving Anolik
IRVING ANOLIK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

UNITED STATES OF AMERICA, ex rel.
SHELDON SELIKOFF,

Petitioner-Appellee,

- against -

COMMISSIONER OF CORRECTION OF THE STATE OF
NEW YORK,

Respondent-Appellant

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Eugene L. St. Louis

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at

1235 Plane Street, Union, N.J. 07083

That on the ~~28~~ 28th day of October 19 75, deponent served the annexed Petition

upon 1) Louis J. Ieffkowitz
2) Carl A. Vegari

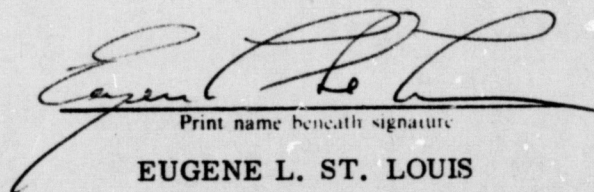
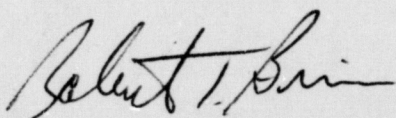
attorney(s) for

in this action, at 1) Two World Trade center, N.Y., N.Y.

2) Courthouse, 166 Main St., White Plains, N.Y.

the address designated by said attorney(s) for that
purpose by depositing ² a true copy ^{es} of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this 28th
day of October 19 75



Print name beneath signature
EUGENE L. ST. LOUIS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

